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Towards Searching The Relevance of Intellectual Property Audit in India: An Appraisal

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Abstract:

In India, intellectual property has become the most effective and dynamic tool for Indian corporate houses in today's complex and competitive business environment. The company has a crucial interest in ensuring that appropriate steps are taken to create and maintain intellectual property assets. Therefore, in India, for creating a successful and valuable Intellectual Property Asset Management System, Intellectual Property Audits for auditing and reviewing the current and potential intellectual assets of the company is essential. Such audits would significantly designate and propose a systematic approach for the management, protection and exploitation of the intellectual assets. An IP audit can be a relatively straightforward exercise that can have a meaningful role in avoiding various circumstances like violation of other's right, protecting one's intellectual property right, clarifying IP ownership issues. It also serves as a guiding tool for maintenance, management and safeguarding of IP rights. As companies recognize the value of their intangibles and rights associated thereto, the importance of intellectual property in assessing the fair value of the companies' wealth is bound to grow. Against this backdrop, this article attempts to evaluate the relevance and applicability of intellectual property audit in India. An Intellectual Property Audit provides information on the nature and strength of the intangible assets by studying the Intellectual Property Right associated with those assets.

Key words: Audit, intellectual, property, India, trademark, patent, copyright.

1. Introduction:

Intellectual Property has become the most effective and dynamic tool for Indian corporate houses in today's complex and competitive business environment. For many companies in information-related industries, intellectual property may encompass a substantial part of the company's assets. The company therefore has a crucial interest in ensuring that appropriate steps are taken to create and maintain intellectual property assets. A corporate sector's value is, by and large, determined on the basis of its assets' quality and not quantity. There are generally two types of resources in a company: tangible (materialistic) and intangible (non-materialistic). The tangible resources include physical resources like building, machinery, raw material etc. and financial resources like shares, stocks, bonds etc. The intangible resources are patents, copyrights, trademarks, trade secrets, designs, licenses etc. In general sense, tangible assets are considered to be the contributing force towards determining the value of a corporate and were supposed to be one of the larger determinants of the competitiveness of an enterprise in the marketplace. Being an integral part of the information and knowledge based economy, the traditional insight has been altered with the view that a corporate intrinsic value is determined by the quality of intangible assets it holds, accompanied by contemporary revolution of information technology and growth of service sector. These intangible assets may be used to generate more returns in the business than the tangible assets, if the IP audit takes place at the right time in the company. Intellectual Property protection and audit are the key elements required for organizations to stay ahead of competition in the global market place. The successful acquisition, protection and management of these intellectual property assets and an effective Intellectual Property Management System plays a crucial role in the success and failures of businesses world wide. The development and

implementation of effective Intellectual Property Management Systems provide companies with appropriate information on their intellectual assets as well as the knowledge on their effective worth. This in turn could help companies identify and decide which intellectual property rights are to be developed, acquired and maintained and pave way for the effective management of their intellectual assets. Therefore, in India, for creating a successful and valuable Intellectual Property Asset Management System, Intellectual Property Audits for auditing and reviewing the current and potential intellectual assets of the company is essential. Such audits would significantly indicate and propose a systematic approach for the management, protection and exploitation of the intellectual assets.

Against this backdrop, this article attempts to evaluate the relevance and applicability of intellectual property audit in India.

1.1. Intellectual Property: meaning of:

World Intellectual Property Organization characterizes Intellectual Property as legal rights that result from intellectual activity. The intellectual activity may consist of any activity in the industrial, scientific, literary and artistic fields. According to the Center for Intellectual Property Rights in India, the major Indian Intellectual properties typically fall into 4 major buckets: Copy Right, Patent, Trademark and Design Protection. IP rights may be acquired in particular for the following categories of intangible assets:

- (i) Innovative products and processes (through patents and utility models);
- (ii) Cultural, artistic and literary works including, in most countries, also for computer software and compilation of data (through copyright and related rights protection);
- (iii) Creative designs, including textile designs (through industrial design rights);
- (iv) Distinctive signs (mostly through protection of trademarks including collective and certification marks, but in some cases through geographical indications);
- (v) Microchips (through protection of layout-designs or topographies of integrated circuits);
- (vi) Denominations for goods of a given quality or reputation attributable to the geographical origin (through protection of geographical indication; and Trade secrets (through protection of undisclosed information of commercial value.

Patents:

A patent protects a new, non-obvious, and useful idea which can protect what it is made of, and even how it is made. It does not protect the appearance of the implementation. If any enterprise has a new function or any technical elements, it uses a patent to protect it. An idea is not new if:

- the idea was in a printed publication anywhere in the world or in public use more than one year before the filing date of a patent application;
- the idea was in a printed publication anywhere in the world or known or before the subject inventor's invention date;
- the idea was abandoned; or
- the idea originated with someone else.
- An idea is obvious if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.
- An idea is not useful if it is merely a law of nature, a physical phenomenon, or an abstract idea.

Registered Designs:

Registered Designs protect the appearance of an item if it is novel. They do not protect the functionality. If your implementation is simply a new look for an existing product with no technical changes, then design rights can be a cost-effective route to give you some protection.

Trade Marks

Trademark law protects a source identifier on goods or services. Trademark and trade dress protection

can last eternally, but they do not extend to protect a non-reputation related disadvantage based on use, cost, quality, or efficiency. A mark that is arbitrary, imaginary or suggestive is protected upon its first use in inter-state commerce; whereas, a mark that is descriptive of the product or service requires established secondary meaning to gain distinctiveness. A generic mark is never protected and a mark can become generic through common use as a noun or verb. Trade dress in the form of product packaging can be inherently distinctive, but product design always requires established secondary meaning to gain protection. A trade mark protects things like brands, business names, product names, advertising slogans and logos. If you have a business idea for a new service offering, this may be the best and only way to gain some protection. The Trade Mark can be registered or unregistered. An unregistered Trade Mark gets some protection merely by being used. A registered Trade Mark can provide important additional benefits and should be used for any business critical branding.

Copyright

Copyright is a mechanical right for the author of any artistic or literary work including engineering drawings and similar items which exists as soon as the work is created. Copyright law only protects fixed and original works of authorship. Originality requires some amount of creativity from an original author. Copyright protection is unavailable for useful pictorial, graphic, or sculptural works when the form and function of the article are inextricably intertwined such that the utilitarian aspects of the design are not physically or conceptually separable from the artistic expression. Pictorial, graphic, and sculptural works include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship in so far as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, and sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified from, and are capable of existing independently of, the utilitarian aspects of the article.

Trade Secrets and Know-How

Trade secret law only protects information that is not generally identified and not readily ascertainable. A trade secret generally must also be the subject of reasonable efforts to maintain secrecy and must have commercial value. Public disclosure to one person may destroy the secret if it becomes generally known. Reverse engineering, independent development, and availability in public materials can make the information readily ascertainable. Therefore, if a Trade Secret or Know-How is being provided as part of a business arrangement, then it must be protected by a non-disclosure agreement.

2. General onset about Intellectual Property Audit in India:

As defined earlier, intellectual property refers to the creation of human intellect in the form of inventions, literary and artistic works, logos, names, design, images etc used in commerce. Intellectual property right is the device to protect such creations and take the form of patent, trade mark, copyrights, trade secrets, designs etc. An Intellectual Property Audit (IP audit) is not just a device for a company to understand what intellectual property it owns or holds. Fundamentally, an IP audit is an inventory of information relevant to the creation, maintenance and use of IP rights. It is also a powerful strategic tool for managing and maximizing return on its intellectual property investment. Like its financial counterpart, a good IP audit gathers information useful in understanding what is happening in the underlying business and market. Simply, Intellectual Property Audit offers an assessment of the intangible assets of the company which examines and evaluates the strength and weakness in the procedures used to protect each intangible asset and secure appropriate intellectual property rights.

IP audit is a systematic review of the IP owned, used or acquired by a business so as to assess and manage risk, remedy problems and implement best practices in IP asset management. It involves undertaking a wide-ranging review of a company's IP assets, related agreements, relevant policies and compliance procedures. Its purpose is to uncover under-utilized IP assets, to identify any threats to a company's bottom

line, and to enable business planners to devise informed strategies that will maintain and improve the company's market position. An IP audit helps a business to make an inventory of its IP assets or update it and analyze how the IP assets are being used or not used, whether the IP assets used by it are owned by the company or by others, whether these IP assets are infringing the rights of others or others are infringing on these rights, and determine, in the light of all this information, what actions are required to be taken with respect to each IP asset, or a portfolio of such assets, to serve the relevant business goals of the company.

It is a conduit that directs the company in registering the IP which is not yet registered, with a feasible solution to get such IP registered and a platform of tools & processes to minimize the issues involving third party rights. The purpose of the IP audit is to quantify the value of the intangible assets, to examine & evaluate the strengths and weaknesses in the procedures used for protecting the intangible assets, to make business strategies for improving the company's market position and to secure appropriate intellectual property rights. IP Audit is carried out to identify inventions (new product, new features, new versions and new processes), trademarks, copyrightable materials, trade secrets, identify Intellectual Property which needs patent, trademark, designs, trade secret and copyright protection depending on importance and priority, review technology agreements (licensing agreements, maintenance agreements, joint development agreements and other related agreements), review employment and consultant agreements (who owns the IP, work-for-hire provision, non-compete provision, trade secrets protection), identify status of various registrations pertaining to trademark, service mark, patents and other IP rights, review the renewal status various IP registrations, catalogue the list of known and unknown IP assets, develop appropriate strategies and policies for creation, development, protection and enforcement of various forms of IP assets.

Consequently, Intellectual Property Audit addresses recognition and valuation of Intellectual Property assets, loss of profit from licensing revenue stream, lack of awareness of possible liabilities.

3. Circumstances to conduct an Intellectual Property Audit in India:

Companies in India own a variety of Intellectual Property that is significant to its business operations and ongoing success. Companies administer Intellectual property, by and large, through the options in protecting the intellectual assets, forging alliances with public and private entities at the R&D level, and freedom to transfer / license the technologies, inventions and services to other third parties. Therefore without regular intellectual property audit, the complete mixture of the various types of Intellectual Property and circumstances surrounding its creation would make it difficult for Corporates to be aware of the full extent of its Intellectual Property Portfolio. An IP audit would help and enable Companies to be in a position to realize the importance of various intellectual property assets in their portfolio. An IP Audit should also be considered as the key elements while formulating the company's strategy, business plans and policy. An intellectual property audit could also decrease the likelihood of infringement of third party intellectual property. Companies that own intellectual property assets, companies that desire to acquire such assets from a third party, and creditors lending to technology-based companies all have a need for a reliable mechanism to determine the ownership, scope and status of intellectual property rights. An "intellectual property audit" of the company provides such a mechanism and enables the detection of defects in intellectual property rights that may affect the value of the company's assets so that corrective measures may be taken. An intellectual property audit is appropriate before a significant acquisition of technology—through merger, stock purchase or other acquisition of assets, or by license or the taking of a security interest. An audit should also be performed in the early stages of a technology company's formation to institute systematic procedures for protecting and perfecting intellectual property rights, and at critical junctures in a company's life cycle to ensure the continuing adequacy of such procedures and to detect defects therein.

Therefore, the IP audit may be general or very specific that needs to be performed largely in the following situations: mergers & acquisitions (M&A), joint ventures (JVs), portfolio assessments, spin-offs, strategic alliances at early stages of a company's formation to introduce systematic procedures for protecting the IP rights.

The following are the situation when IP Audit is conducted.

Surpassing critical stage of business life cycle:

The IP audit may be performed at some critical stages of a life cycle of the company or product to ensure the right movement in the market and to find out any impediments, if there are.

Development of new product:

The IP audit may be preferred in the stage of development of a new product to avoid the risk of infringement of third party IP rights (i.e. Freedom to Operate).

Implementation of New Intellectual Property Management:

If the organization has new intellectual property management, the new intellectual property manager should have a thorough intellectual property audit performed to become familiar with the status of the portfolio.

Merger, Acquisition, Significant Stock Purchase:

The IP audit may be obligatory to conduct at the time of significant corporate changes such as merger & acquisitions and significant stock purchases as these changes may have greater influences on IP ownership. A significant corporate change (merger, acquisition, significant stock purchase) can influence intellectual property ownership which is another warning sign for an intellectual property audit.

Transfer or Assignment of Interest in Intellectual Property:

A transfer or assignment of intellectual property from one organization to another necessitates an intellectual property audit of both organizations' intellectual property. The intellectual property audit ensures both the organizations that the transfer or assignment fulfills the interests of both by guaranteeing that the intellectual property is properly protected and enhances the acquiring organization's existing intellectual property interests and that the intellectual property does not leave any unplanned vulnerabilities for the organization transferring the interests.

Licensing Arrangement:

An intellectual property audit should be conducted when an organization sets up an intellectual property license and on a regular basis thereafter. This is important whether the organization is the licensor or the licensee. If the organization licenses its intellectual property to others, it must of course actually own the intellectual property that it is licensing. Also, there must be no existing licenses that would hinder the proposed new license. If the organization is the licensee acquiring the intellectual property rights of another, the audit determines that the scope and extent of the license to be obtained is enough for its purposes.

Coping up with major changes in Legislature:

A significant change in case or statutory law may compel an enterprise to evaluate its intellectual property again. The limited scope of IP audit may be needed in some situations such as creation of a new law or amendment of an existing law that broadens the scope of IP protection (for example: business methods patents in India), may require the necessary review of the existing products for its effect on the organization's IP rights as well as potential infringement of the third party IP rights.

One such change in statutory law occurred when Congress Government of India passed the federal anti-dilution statute. This change in the law significantly impacts the analysis of the potential liability of an organization for infringement of the trademarks of others and also affects the analysis of whether or not others are infringing the organization's rights. Three examples of case law which arouse the need for an intellectual property audit are the *Qualitex* case (which deals with the protection of color as a trademark), the *Sony* case (which deals with the question of whether a device that can be used for copyright infringement is itself an infringement of copyright), and the *Festo* case (which deals with the Doctrine of Equivalents in patent prosecution).

Complying with Financial Transactions Involving Intellectual Property:

Financial transactions involving intellectual property include loans, public offerings, private placements, or any other transaction which directly involves an organization's intellectual property, or in which the intellectual property of the organization could be significant.

New Client Program or Policy:

Before adopting a new trademark for the company or the product, it is imperative to perform a basic search

beforehand in order to validate that the trademark does not infringe another party's prior rights over the same mark. It is advisable to conduct an IP audit when engaging in domestic or international commerce and purchasing the rights of an under development product.

4. Methodological issues concerning Intellectual Property Audit:

4.1. Steps in conducting IP Audit:

Steps in conducting IP Audit are as follows:

i) Formulation of Audit Plan & Procedure:

The audit plan should identify the tasks, the people, the timeline and the estimated cost. When the plan is approved, the audit can begin. Before initiating the IP audit, a written audit plan should be prepared. The plan should obviously state the scope of the audit, scope of the inquiry, areas of the inquiry, documents to be reviewed, individuals to be interviewed, schedule, name of the responsible team members for their respective work, deadline of the assigned job, outline of the final report to be generated. The plan must be discussed among all the members of the audit team.

ii) Collection of interrelated Information:

The audit team members who are in charge for assembling the relevant information must collect and review the appropriate information before the audit starts. The company's internal processes, agreements, inventions not yet patented, unregistered trademarks, copyrights and mask work rights, and trade secrets must be determined by talking to the right people in the company. With a checklist of the information sought, those persons can provide information or direct the auditors to the people in the company responsible for the information being sought. The information may be assembled from the agreements such as consulting agreements, employee agreements, confidential agreements, distribution agreements, license agreements etc., relevant filed documents of patent, copyright, trademark & design, trade secrets, know-how processes, licenses given or taken from the third party, research manuals, published research papers, journals, product brochures, advertisements, company's past records, training programs, promotional strategies, release notes, invention disclosure forms, R&D notebooks, records of technical work, security procedures and exit-interview procedures. The team may collect more information from the executives of the company, regarding all transactions of concerned issues and intent letter of the parties involved in the transactions.

iii) Consolidation of Information:

After getting together the relevant information, it is united in a well-planned manner in two categories: a) Registered and b) Unregistered IP assets. For registered IP assets, the filing date is noticed and thereafter; the renewal fee to be paid and required necessary actions are decided. For unregistered IP assets, it is determined that these assets must not infringe the third party IP rights. Any threat of a litigation case may cost the company a high amount to pay.

iv) Evaluation of Consolidated Information:

After consolidation of the information, each & every IP asset is evaluated based on different IP valuation methods. In case of acquiring a company, valuation may portray the actual worth of the company to be bought and may provide a good deal.

v) Analyzing the Information:

The intellectual property processes and systems audited can be judged against the best practices. The quality of patent, trademark and copyright protection and the risks to the company in possibly infringing intellectual property rights owned by others should be analyzed by intellectual property counsel who specializes in those areas of the law. Intellectual property counsel should also review the agreements collected to assess the risks and benefits in them.

vi) Implementation stage:

After evaluating the available IP assets of the company, the required actions may be taken such as: filing of unregistered IP assets, licensing or cross licensing of IP assets, selling of IP assets, buying of small companies, making an IP portfolio from the IP assets available, recruiting some experts in the company,

expanding the team, changing the promotional strategies or business strategies etc.

vii) Creation of IP Audit Report:

The results of an intellectual property audit should normally be reflected in a report which should include the objective of the audit, the audit plan and how it was executed and the results of the analysis. It should describe and evaluate intellectual property defects uncovered in the audit, propose and describe specific remedial action that needs to be taken or that has been taken, and respond to any other specific need for information the parties commissioning the audit may have. The report must define a systematic review of the IP assets owned, used or acquired by a company, importance of the IP assets in the company. The report must suggest that how to protect IP rights of the company in a better way & the need to register the IP asset, if any, which is not yet registered. The report must provide solutions to minimize the issues involving third party IP rights. The IP audit team must help the company to think about cost-benefit analysis before filing of patent applications. The report should resolve the ownership issues related to patents, copyrights, licenses and joint ownership issues. At the end, the audit plan is revised to ensure that the defined targets have been achieved by the team.

4.2. Process involved in Intellectual Property Audit in India:

In establishing an audit process it is important to determine in advance what is to be accomplished so that neither more nor less than needed is done. It is also important to create a record of what is done for use in valuation and/or future planning.

Step 1: Record the company's intellectual property:

- Recognize all of the company's patent, trade secrets and licenses.
- Generate a spreadsheet organizing all of the company's intellectual property.
- In the event trade secrets have not previously been inventoried, solicit and screen records of invention to identify trade secrets and memorialize into formal trade secret registry.
- Record licenses and purge expired agreements
- Further eliminate expired patents

Step 2: Group intellectual property by class:

- Allocate each piece of the company's intellectual property to one of four Categories:
 - i). Products: any marketed product.
 - ii). Projects: any project beyond the conceptual stage.
 - iii). Functional Areas: any intellectual property related activity of the company that affects more than one product or project (e.g. upstream manufacturing processes, pathogen testing, quality and bio-analytics).
 - iv). Other: any asset that does not fit in the above categories.

Step 3: Name each intellectual property asset:

- Patents: A three letter code that designates in which group the patent belongs (e.g. a particular product or project) followed by the last three digits of the patent number or patent application number.
- Trade Secrets: The same three letter code the group designating followed by the inventor disclosure number that was the genesis for the trade secret in question.
- Legal Opinions: The same three letter code designating the group, followed by the type of opinion and the date it was last updated.

Step 4: Prepare process chart for each class of intellectual property:

- The process chart describes the relevant components of the product, project or functional area and indicates where in such process each asset is associated.
- The chart should be drafted to inform the reader at a glance how they fit within the overall process or function.

Step 5: Arrange written description:

- Provide additional technical details and specificity not explored by the Process Chart.
- Capture the process and the contribution of each intellectual property asset with significant details.

Step 6: Prepare individual asset report:

- For each intellectual property asset, prepare a written report G I P A comprising a legal, commercial and technical review.

i). Legal Review: Assess the continued enforceability and legal strength of the patent and the jurisdiction in which the patent has been issued or application filed.

ii). Technical Review: Determine whether or not the asset in question is still relevant to the company's processes or operations.

iii). Commercial Review: Assess the competitive contribution of the asset (e.g. whether or not the loss of the asset would hurt the company or aid its competitors).

5. Advantages of conducting Intellectual Property Audit in India:

Escalating the value of a company can be ascribed to its intellectual property and other intangible assets. Without effective management of these assets, much of this value can be overlooked, poorly leveraged, or even lost. Identification and valuation of a company's intellectual property has become a greater concern to management due to recent changes in the securities laws. Without accurate information about its intellectual property, a company may be extravagant on patent prosecution and maintenance fees, or ineffectively employing limited company resources to the management of intellectual property assets. An IP audit establishes a baseline from which the financial and strategic impact of subsequent changes in intellectual property can be measured. When executed effectively as part of an overall business strategy, these aspects of 'IP governance' can deliver business an array of commercial and bottom-line benefits:

- Enables more informed decision making by management because management can understand what IP assets the enterprise own, and what are their exact value.
- Enables more accurate internal and external financial reporting.
- Enables sharing of significant and incremental innovations within a business – domestically and internationally
- Preserves the opportunity to use and commercialize IP by minimizing risk of failing to identify and protect IP on a timely basis.
- Legally able to block competitors out of your markets, e.g. through patent filing.
- Enables the creation of an envelope of protection for core IP assets through strategic leveraging (protection and searching) of the IP legal system.
- Enhances business reputation as an innovator, market leader, employer of choice for recognizing staff innovation, and profitable business.
- Enhances access to debt or equity funding to continue strategic initiatives by protecting, valuing and even mortgaging IP assets.
- Enhances attractiveness as business partners for alliances or joint ventures with third parties which respect the use you make of your IP assets.

6. Protection of Intellectual Property Right (IPR) in India:

6.1. A few examples of Counterfeiting and Piracy in India:

Counterfeiting and Piracy exhausts businesses, causes huge tax revenue and employment losses to governments, weakens society of creative talent and jeopardizes consumer safety. There is evidence to link

the proceeds from counterfeiting and piracy activities being diverted to fund organized crime. While the terms Piracy and Counterfeiting are generally used interchangeably, the former refers largely to copyright violations in films, music and software while counterfeiting is used in connotation of trademark violations. The items being counterfeited and pirated include everything from shoe-polish, shampoos and sunglasses to drugs, food, computer hardware and software, movies, music, automobile parts and even aircraft spares. The advent of the Internet as a marketing tool has made the job to publicize counterfeits even easier, substantially lowering the cost of such operations and making identification and pursuit of pirates more difficult. A significant factor in the proliferation of fake goods is the reduced and in some cases, significantly discounted prices, which attract buyers.

India has a large drug manufacturing industry, which currently comprises of 250 large units, about 8000 small-scale units, including 5 central Public sector units. These units produce a complete range of formulations and bulk drugs. (Source: Asia Times online).; Fake medicines are estimated to occupy between 15 to 20 percent of the total Indian market. Not only allopathic drugs have spurious competition, but fake homeopathic drugs are also spreading in the market (Source: Tribune News Service). Music industry is passing through difficult times; 40% of music industry's production ends being copied and distributed illegally in India. Loss of revenue to music industry is Rs 600 crores annually and film industry is of Rs 2000 crores/ year since last 3 years due to piracy. In India 1 in 3 automotive parts are copied. Spurious car parts take up an estimated 37% of the market in India. (Source MEMA).The impact of counterfeiting in FMCG sector is 8-10%, hampering quality of goods as well as raising concerns about health issues.10 % of the major soft drinks sold in India is fakes and 10-30 % of cosmetics, toiletries and packaged foods are counterfeited.

A random search of registered Indian companies reveals that there are over 60 companies starting with the word 'Nike'; 65 companies starting with the word 'Rolex'; 217 companies starting with the word 'Intel'. This is not limited to multinationals and there are 136 companies beginning with the word Tata, and over 400 companies beginning with the word 'Reliance'.

6.2. Government initiatives to protect Intellectual Property Right in India:

The debate on the protection of IPRs has often been placed in a 'North-toward-South' perspective. Every key aspect of the business from fundamental technology to the commercial brands should be protected so that the whole enterprise is worth more than the sum of the parts. Increasingly as manufacturing moves to low cost economies, it is vital that the differentiating and profit generating characteristics of the business that are based on its technology and designs are ring-fenced and protected. The primary step on the road to protecting these assets is to audit the enterprise to ensure that the key elements have been identified. Then, a strategy to protect them and enhance the value of the company can be developed.

An intellectual property right affords a person who performs human intellectual creative activities with the right to exclusively use such creation in a variety of areas. Goods, which are made by using the result of human intellectual creative activities without prior consent from the right holder and which ignore such rights, are called counterfeits and pirated goods. Infringement means the creation of counterfeits and pirated goods and the usage of such creation without prior consent. For such infringement, the right holder may seek the prohibition of usage and claim for damages. The infringement may happen in case of patent, trademark, and or copyright.

The importance of intellectual property to businesses has increased dramatically over the last 15 to 20 years. The Indian government has initiated various steps towards Intellectual Properties Rights Protection.

Indian enforcement agencies are working effectively and there is a decline in the levels of piracy in India. In addition to intensifying raids against copyright violators, the Government has taken a number of measures to strengthen the enforcement of copyright law. A summary of these actions is given below:

i). The Government has brought out a 'Handbook of Copyright Law' to generate awareness of copyright laws amongst the stakeholders, enforcement agencies, professional users like the scientific and academic communities and members of the public. Copies of the Handbook have been circulated free-of-cost to the state and central government officials, police personnel and to participants in various seminars and

ii). National Police Academy, Hyderabad and National Academy of Customs, Excise and Narcotics conducted several training programs on copyright laws for the police and customs officers. Modules on copyright infringement have been included in their regular training programs.

iii). The Department of Education, Ministry of Human Resource Development, Government of India has initiated several measures in the past for strengthening the enforcement of copyrights that include constitution of a Copyright Enforcement Advisory Council (CEAC), creation of separate cells in state police headquarters, encouraging setting up of collective administration societies and organization of seminars and workshops to create greater awareness of copyright laws among the enforcement personnel and the general public.

iv). Special cells for copyright enforcement have so far been set up in 23 States and Union Territories, i.e. Andhra Pradesh, Assam, Andaman & Nicobar Islands, Chandigarh, Dadra & Nagar Haveli, Daman & Diu, Delhi, Goa, Gujarat, Haryana, Himachal Pradesh, Jammu & Kashmir, Karnataka, Kerala, Madhya Pradesh, Meghalaya, Orissa, Pondicherry, Punjab, Sikkim, Tamil Nadu, Tripura and West Bengal.

v). The Government also initiates a number of seminars/workshops on copyright issues. The participants in these seminars include enforcement personnel as well as representatives of industry organizations.

As a consequence of the number of measures initiated by the government, there has been more activity in the enforcement of copyright laws in the country. Over the last few years, the number of cases registered has gone up consistently.

6.3. Way to reduce the risk of offshore Intellectual Property loss:

The following techniques will assist to restrain the risk of losing Intellectual Property in conducting business abroad.

i). *Comprehending the Intellectual Property rights:* The initial step is to get an outline of the different initiatives and laws undertaken by the offshore country to protect the Intellectual Property.

ii). *Establishing an Internal Intellectual Property protection team:* Intellectual property protection is an ongoing business responsibility and not a one-time act. This makes it very critical to have a team in the company that is responsible for monitoring their Intellectual properties, violations etc.

iii). *Evaluating the work entities that can be copyrighted /patented:* A continuing evaluation of the company's work entities to identify copyright protection/patents is very significant. While copyrighting, it is important to ensure that such a protection will be legitimate in the country of offshore activity/development.

iv). *History of Offshore vendor:* If the company is scheduling to enter into a vendor relationship with an offshore entity, extreme caution has to be exercised in understanding the vendor's history with respect to any Intellectual property violations.

v). *Defining IP violation clause:* In executing a contract with the offshore vendor, the enterprise has to identify a separate Intellectual Property Violation clause and define the consequences of Intellectual property violation.

vi). *Seeking a reference check for all the team members:* It is not only imperative to look at the resumes of the offshore team but also very important to seek the appropriate references to make sure there is no IP violation case history behind the individual.

vii). *Attention to use of unauthorized software/third party products:* It should be the practice to heavily discourage the use of unlicensed software or products both by the onsite and the offshore team.

viii). *Performing Periodic IP Audit:* Perform a periodic IP audit and examine any new work that can be copy righted, remove all the unauthorized software/product, reiterate the importance of IP, look into all the place holders of the code/documents, assign appropriate ownership to the critical documents and update any change of ownership to patents.

The Government of India as well as Industry also is taking a series of legal measures to restrain this hazard. The important initiatives taken at the national level include:

Section 11 of the Customs Act, 1962 provides that the Central Government may, by issuance of notification in the official Gazette, prohibit either absolutely or subject to such conditions as may be specified, import or export of goods for the purposes specified in sub-section (2) of section 11 of the Customs Act, 1962. The Central Government may restrict or prohibit import and export of goods infringing trademarks, patents and copyrights under clause (n) of subsection (2) of section 11 of the Customs Act, 1962. Thus, it is important to make sure that the right holder participates in the Customs proceedings. In case the right holder refrains, the Customs have no obligation to continue with the detention and the goods shall be released forthwith, if otherwise in order.

The Copyright Enforcement Advisory Council (CEAC) has been set up by the Government of India to review the progress of enforcement of the *Copyright* Act periodically and to advise the government regarding effective strategies for enforcement of Intellectual Property Rights. The term of *Copyright Enforcement Advisory* Committee is 3 years but the CEAC is reconstituted after periodically after expiry of the term.

The Copyright Enforcement Advisory Council is headed by the Secretary Higher Education and has as its members, police chiefs of 23 States, besides other stakeholders. The States and Union Territories of India have either set up *copyright* enforcement cells or special cells in the Crime Branch/ Economic Offences Wings to look after *copyright* and other intellectual property offences. In India, the Intellectual Property Rights (IPR) of computer software is covered under the Copyright Law. Accordingly, the copyright of computer software is protected under the provisions of Indian Copyright Act 1957. Major changes to Indian Copyright Law were introduced in 1994 and came into effect from 10 May 1995. These changes or amendments made the Indian Copyright law one of the toughest in the world.

The amendments to the Copyright Act introduced in June 1994 were, in themselves, a landmark in the India's copyright arena. For the first time in India, the Copyright Law clearly explained the rights of a copyright holder, position on rentals of software, the rights of the user to make backup copies.

Since most software is easy to make photocopy, and the copy is usually as good as original, the Copyright Act was desirable. Some of the key aspects of the law are:

- ☐ According to section 14 of this Act, it is illegal to make or distribute copies of copyrighted software without proper or specific authorization.
- ☐ The violator can be tried under both civil and criminal law.
- ☐ A civil and criminal action may be instituted for injunction, actual damages (including violator's profits) or statutory damages per infringement etc.
- ☐ Heavy punishment and fines for infringement of software copyright.
- ☐ Section 63 B instructs a minimum jail term of 7 days, which can be extended up to 3 years.

7. Summary and Conclusions:

In India, an intellectual property audit can afford an invaluable mechanism for companies owning intellectual property assets, companies desiring to acquire such assets from a third party, and creditors lending to technology-based companies to determine the ownership, scope and status of intellectual property rights. The creation of proper wealth of rapidly developing economy depends heavily on generation and maintenance of intellectual property. It is possible now for any person to create value in the economy through the creation of a copyrighted article, a patentable invention or a trademark. As the software boom continues throughout world in general and India in particular, the need for determining and judging its value arises which inevitably requires review of the position of intellectual property through intellectual property audit.

An Intellectual Property Audit provides information on the nature and strength of the intangible assets by studying the Intellectual Property Right associated with those assets. An IP audit can be a relatively straightforward exercise that can have a meaningful role in avoiding various circumstances like violation of

other's right, protecting one's intellectual property right, clarifying IP ownership issues. It also serves as a guiding tool for maintenance, management and safeguarding of IP rights.

As companies recognize the value of their intangibles and rights associated thereto, the importance of intellectual property in assessing the fair value of the companies' wealth is bound to grow. As a result, the role of intellectual property audit and valuation has a long way to go. Professionally experts in this sphere will certainly sharpen their skills in order to conduct meaningful and an effective audit and valuation which will further assist companies of India in safeguarding against terrible future surprises.

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